Criminal Appeal No.601-DB of 2001.

IN THE HIGH COURT FOR THE STATES OF PUNJAB & HARYANA AT CHANDIGARH

...

Date of Decision: January 11, 2008.

Anandi alias Nandi **...** Appellant

VERSUS

State of Haryana **...** Respondent

1. Whether the Reporters of Local Newspapers may be allowed to see the judgment ?

2. To be referred to the Reporters or not ?

3. Whether the judgment should be reported in the Digest ?

CORAM :

HON'BLE MR.JUSTICE ASHUTOSH MOHUNTA.

HON'BLE MR. JUSTICE MOHINDER PAL.

Present: Mr.K.D.S. Hooda, Advocate,
for the appellant.

Mr. S.K. Hooda, Additional Advocate General, Haryana.

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MOHINDER PAL, J.

Appellant Anandi alias Nandi has filed this appeal against the judgment of conviction and sentence order dated

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October 08, 2001, passed by the learned Additional Sessions Judge, Faridabad, whereby he was convicted and sentenced under Sections 302 and 201 of the Indian Penal Code (hereinafter referred to as `the Code'). Under Section 302 of the Code, he sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.1,000/- and in default thereof to undergo further rigorous imprisonment for one year. Under Section 201 of the Code, he was sentenced to undergo rigorous imprisonment for five years. Both the substantive sentences of imprisonment were, however, ordered to run concurrently.

2. As per facts of this case, Sunil Kumar complainant (P.W.10), resident of Jhuggi Godha Khol, Faridabad, made statement (Exhibit P.D) to the police alleging therein that he was residing at that place for the last one year along with his three children and was working as a labourer. His eldest son Shiv Kumar deceased (hereinafter referred to as `the deceased') was aged about nine years and his two daughters were Sangeeta and Kanchan. On May 29, 2000, he along with his wife had gone to the doctor and all the three children were left with his cousin brother Anandi (accused) in the house. At about 6 P.M, he returned back and found that his son Shiv Kumar was missing. Enquiry was made from the accused, who answered that he had gone to take bath after leaving the children in the house and that when he returned back,Shiv Kumar was not available. The complainant along with his

brother started search of the missing child in the neighbourhood and nearby bushes, but without any results. On the next day i.e May 30, 2000, in the morning when the search was still going on, some ladies told that a boy was lying under the stones in the pits of the hills. The complainant along with the accused went there and found that Shiv Kumar had a deep wound over his neck and there were a number of other injuries on his body. The complainant got recorded his statement (Exhibit P.D) that his son had been killed by some unknown person and on the basis of this statement, formal First Information Report (Exhibit P.D/2) was recorded for the offence punishable under Sections 302 and 201 of the Code. During investigation, the accused was arrested and he made a disclosure statement (Exhibit P.M) to the effect that because of some old enmity, he had killed the child by putting him in the ditch and thereafter throwing stones on him. He further disclosed that after the incident, he had taken a bath in the `Mandir' and had washed his shirt as well as handkerchief. In pursuance of his disclosure statement, he got recovered shirt and handkerchief from his `Jhuggi' (hut), which were taken into possession vide recovery memo (Exhibit P.L). The articles so recovered including the stone, blood-stained earth etc. were sent to the Chemical Examiner. The Chemical Examiner, as per report (Exhibit P.P) could not find any blood on the shirt and handkerchief allegedly recovered from the accused.

3. After completion of investigation and due formalities,

challan against the accused was presented in Court.

4. In support of its case, the prosecution examined Dr.Arvind Lohan (P.W.1), Ramesh Chand, Assistant Sub Inspector (P.W.2), Hari Chand, Moharrir Head Constable (P.W.3), Manoj Kumar, Draftsman (P.W.4), Gurmeet Singh, Constable (P.W.5), Mukesh Kumar, Constable (P.W.6), Kuldeep Singh, Constable (P.W.7), Sukram Pal, Photographer (P.W.8), Ran Singh, Head Constable (P.W.9), Sunil Kumar complainant (P.W.10), Ram Singh, a child of nine years (P.W.11), Rishi Pal, Assistant Sub Inspector (P.W.12) and Kuldeep Singh, Deputy Superintendent of Police (P.W.13).

5. Thereafter, statement of the accused under Section 313 of the Code of Criminal Procedure was recorded wherein he denied the prosecution allegations and pleaded innocence. No evidence was led in defence.

6. The trial Court, on consideration of material on record, especially the evidence of complainant Sunil Kumar (P.W.10), Ram Singh (P.W.11), a witness of last seen, and the recoveries made on the basis of disclosure statement (Exhibit P.M) of the accused, found him guilty and convicted and sentenced him, as stated in the opening para of the judgment.

7. We have heard Mr. K.D. S. Hooda, learned counsel for the appellant and Mr.S.K. Hooda, learned Additional Advocate General, Haryana, and have gone through the records of the case with their help.

8. Learned counsel for the appellant argued that there was no motive for the accused to commit murder of a child of his relative with whom he was residing in the locality. He further argued that evidence of the complainant and that of the witness of last seen was liable to be ignored in view of the fact that the accused was not named in the First Information Report and the witness of last seen was a small child of nine years, who had deposed against the accused on the asking of his father. It was also argued that the alleged recoveries made on the basis of disclosure statement of the accused are of no consequence as these are hit by Section 25 of the Indian Evidence Act. He referred to the report of Forensic Science Laboratory (Exhibit P.P) and contended that in absence of any blood on the clothes sent for chemical examination, the accused was liable to be acquitted.

9. On the other hand, learned Additional Advocate General, Haryana, laid stress on the point that there was a motive for the accused to have caused the murder of the child as about twelve years prior to the occurrence, brother of the accused was alleged to have been killed by the father of the deceased. He further argued that the recoveries made on the basis of the disclosure statement made by the accused further connect him with the crime. Finally, it has been argued that the evidence of last seen in the form of Ram Singh (P.W.11) cannot be brushed aside simply on the ground that the witness was of

nine years. Accordingly, he has prayed for dismissal of the appeal.

10. We have given our anxious consideration to the contentions of both the sides. Dr.Arvind Lohan (P.W.1) had conducted autopsy on the dead body of Shiv Kumar and had found the following injuries:-

> " 1. There were multiple small abrasions of 3 to 7 cms size all over the body.
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> 2. Bluish colour contusion around both eyes on the forehead. On opening the skull, there was sub-cutaneous haemotoma on both sides and there was no fracture of underlying bones. Brain matter was congested.
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> 3. There was eleptical shape about 9 cms x 1 cm, sharp-edged wound, going deep to the trachea, cutting through the vessels and nerves on both sides in the neck. Blood was present in the trachea."

So, the doctor had noticed multiple small abrasions on whole of the body of the deceased and no fracture of underlying bones was detected. There were no symptoms of unnatural offence as no injury had been detected around the anus. Further, on request made by the police, the doctor gave his opinion (Exhibit P.C) on July 04, 2007, after examining the stone shown to him, that the injury on the neck was possible with that stone. After examination, the stone was re-sealed.

However, the said stone was never produced in Court by the prosecution. From this evidence of the doctor, we are unable to conclude whether the death of the child had taken place because of deliberate striking of the stone on the neck of the deceased or it had occurred after a heap of stones had fallen on his body in some accident. We have reached this conclusion after noticing the other injuries as there were multiple abrasions 3 cms x 7 cms size all over the body of the deceased.

11. The motive part in this case also requires to be discussed. In the original version of the First Information Report, the complainant Sunil Kumar (P.W.10) had not expressed any doubt on accused Anandi and had even stated that the accused was his brother. Motive for the murder of Shiv Kumar in this case emerged, for the first time,l from the disclosure statement (Exhibit P.M) allegedly suffered by the accused while in police custody. He allegedly stated that ten/twelve years back he along with his brother Ganesh, complainant Sunil and his (Sunil's) brother-in-law (sister's husband) Durjan had gone to Chandigarh for some work. Some hot words were exchanged between Durjan and Ganesh over some dispute. Thereafter, one night the complainant took drinks with Ganesh, brother of the accused, and in the morning Ganesh felt pain in his stomach, upon which Sunil and Durjan took him away. On return, they told that Ganesh had died on the way. He further disclosed that they did not take any action, but later on they doubted

that Durjan and Sunil Kumar had administered some poisonous object in the liquor and had given it to Ganesh, as a result of which he died. He further stated that on finding an opportunity to take revenge for the death of his brother Ganesh, on the relevant day, he took the deceased to the hill side, pressed his mouth with one hand and his neck with the other hand as a result of which he died. Thereafter, he lifted a sharp edged stone lying there and with it cut the neck of the deceased and blood appeared on the neck. While doing so, his hands and shirt were smeared with blood. He wiped the blood on his hands with the handkerchief. Thereafter, he hid the body of the deceased behind the stones and came back to the `Jhuggis' after having a bath in the temple washing his shirt and hand with soap. He returned to `Jhuggis' before the return of the complainant. In pursuance of his disclosure statement, he also got recovered shirt and handkerchief etc. It is well-settled that a new fact which has been said by the accused while in police custody and which was not in the knowledge of the police and the recoveries made on the basis of that fact are hit by the provisions of Sections 25 and 26 of the Indian Evidence Act. It is worth mentioning that disclosure statement (Exhibit P.M) of the accused was recorded on June 1, 2000 and in his statement recorded under Section 313 of the Code of Criminal Procedure, on August 07, 2001, he had given his age as twenty-two years. Thus, when calculated from June 01, 2000, when his

disclosure statement was recorded, the age of the accused ten/twelve years prior thereto, would be around twelve years. It is highly improbable that a boy of about twelve years would think that some poisonous substance had been given in liquor to his brother as a result of which he died. Then, he would nurse a grudge for ten/twelve years and instead of taking revenge from the person who had allegedly given some poisonous substance to his brother in liquor resulting in his death, would cause the murder of his nine years old boy. Had there been any enmity between the accused and the complainant, he must have named the accused in the first instance while making a statement before the police. Moreover, the accused had been accompanying the complainant when they were making search for the deceased at the places around the huts. Further more, complainant Sunil Kumar (P.W.10) deposed that the police arrived on May 30, 2000, whereas as per the Investigating Officer, Deputy Superintendent of Police Kuldeep Singh (P.W.13), the accused in this case was arrested on June 01, 2000. This also throws a doubt upon the proper investigation of the case.

12. Another important witness of the prosecution is Ram Singh (P.W.11), aged about nine years at the time of making deposition in the Court. In the examination-in-chief, he stated that about one year back he was playing with the deceased when the accused made a signal with his finger to the deceased to

accompany him and thereafter both of them were last seen while going together. It is pertinent to mention here that at the time of incident, this witness was about eight years of age. In such circumstances, the evidence of a child witness has to be scrutinised with due care and caution. In his cross-examination, Ram Singh (P.W.11) stated that it was the morning time when the accused signalled the deceased to accompany him. However, if it was morning time, then the story as put forward by the complainant while deposing in Court that he along with his wife had gone to the doctor at about 4 P.M in the evening and returned back at 6 P.M/6.30 P.M on the relevant day, is falsified. So, the incident of morning can be termed as a separate incident as at about 4 P.M when the complainant allegedly left for the doctor along with his wife, the deceased was at home and was left in the company of the deceased. Further cross-examination of this witness falsifies the entire story of the prosecution regarding last seen as this witness has stated that he deposed in the Court on the tutoring of his father.

13. Before parting with the judgment, we would like to point out that the stone alleged to have been used in commission of the crime i.e weapon of offence, had not been produced in Court. The stone was shown to the doctor and after seeing the same, he gave opinion (Exhibit P.C) on July 04, 2007, that the injury on the neck was possible with that stone. After examination, the stone was re-sealed and given to the police. However, the said

stone was never produced in Court by the prosecution nor any explanation is coming forth for this lapse. Thus, the defence had been deprived of its right to cross-examine the witnesses on this point and the non-production of stone casts a serious doubt upon the truthfulness of the prosecution case. The stone having not been produced or exhibited in Court, no importance can be given to the opinion of the doctor that the injury on the neck was possible with that stone. The trial Court did not give any specific finding in this regard except observing that " it is correct that the nature of the case required that there should have been scientific investigation and the police ought to have lifted finger prints not only from the dead body but also from the alleged stone which was used for committing the crime." Despite noticing this, the trial Court held that the prosecution has been able to prove its case by leading circumstantial evidence, which evidence, as discussed above, cannot be relied upon.

14. For the reasons recorded above, we accept this appeal, set aside the judgment and sentence order, both dated October 08,2001 passed by the trial Court, and acquit the accused of the charges framed against him.

(ASHUTOSH MOHUNTA)
JUDGE

(MOHINDER PAL)
JUDGE

January 11, 2008.
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